

1 THE HONORABLE ROBERT S. LASNIK
 2 THE HONORABLE RICHARD A. JONES
 3
 4
 5
 6

7 UNITED STATES DISTRICT COURT
 8 WESTERN DISTRICT OF WASHINGTON
 9 AT SEATTLE

<p>10 BRUCE KEITHLY, DONOVAN LEE, and 11 EDITH ANNA CRAMER, Individually and on 12 Behalf of all Others Similarly Situated, 13 14 Plaintiffs, 15 v. 16 INTELIOUS, INC., A Delaware Corporation; and 17 INTELIOUS SALES, LLC, A Nevada Limited 18 Liability Company, 19 Defendants.</p>	<p>20 No. C09-1485 RSL 21 PLAINTIFFS' MOTION TO 22 CONSOLIDATE CASES AND APPOINT 23 INTERIM CLASS COUNSEL 24 Noted for Consideration: April 16, 2010</p>
<p>25 MATTHEW BEBBINGTON, Individually and 26 on Behalf of all Others Similarly Situated, 27 28 Plaintiffs, 29 v. 30 INTELIOUS, INC., A Delaware Corporation; and 31 INTELIOUS SALES, LLC, A Nevada Limited 32 Liability Company, 33 Defendants.</p>	<p>34 No. C10-500 RAJ</p>

1 Plaintiffs Bruce Keithly, Donovan Lee, Edith Anna Cramer, and Matthew Bebbington,
 2 through their counsel, respectfully move the Court to transfer *Bebbington v. Intelius, Inc. et al.*,
 3 C10-500 RAJ to the Honorable Chief Judge Robert Lasnik; to consolidate their cases; to appoint
 4 Plaintiffs Matthew Bebbington, Bruce Keithly, Donovan Lee and Edith Anna Cramer as Interim
 5 Lead Plaintiffs; and to appoint Cohen Milstein and Keller Rohrback as Interim Class Co-
 6 Counsel.
 7

8 **BACKGROUND**

9 Plaintiffs Keithly, Lee and Cramer (collectively the “*Keithly* Plaintiffs”) represented by
 10 Cohen Milstein, with Keller Rohrback L.L.P. serving as local counsel, filed a complaint against
 11 Intelius, Inc. and Intelius Sales, LLC (collectively, “Defendant” or “Intelius”) on October 19,
 12 2009, alleging that Intelius’s participation in a post-transaction marketing scheme violates the
 13 Washington Consumer Protection Act (“WCPA”). The *Keithly* Plaintiffs seek damages and an
 14 injunction barring this type of conduct for themselves and a national class of similarly situated
 15 persons. On March 24, 2010, Plaintiff Matthew Bebbington, represented by Keller Rohrback
 16 L.L.P., filed a class action complaint against Intelius, alleging that Intelius’s use of in-cart and
 17 post-transaction marketing techniques to boost sales and profits is a deceptive trade practice and
 18 impermissible under the WCPA. Plaintiff Bebbington, too, seeks damages and injunctive relief.
 19 These Plaintiffs now move jointly to transfer the *Bebbington* action, to consolidate the two
 20 actions and to appoint Keller Rohrback L.L.P. and Cohen Milstein as interim class co-counsel.
 21

22 Shortly after the *Keithly* action was filed, Defendant Intelius asked the Judicial Panel on
 23 Multidistrict Litigation (“JPML”) to transfer a similar case – *Baxter v. Intelius, Inc., et al.*, Case
 24 No. 8:09-cv-01031-AG-RSM (C.D. Cal.) – from the Central District of California to this
 25

1 District.¹ *Baxter* is more narrowly drawn than *Keithly* and *Bebbington*; there, the plaintiff alleges
 2 violations of California law against Intelius on behalf of California residents only.² The JPML
 3 heard argument on this motion on March 25 and is expected to rule within the next two weeks.
 4 On April 1, 2010, Intelius' counsel Tyler Farmer filed a Supplemental Declaration with the
 5 JPML, testifying that other plaintiffs' firms are advertising their own "investigations" of the
 6 post-transaction marketing practices at issue in these lawsuits. See Griffin Decl. at Ex. 2,
 7 attaching Farmer Supplemental Declaration.

9 **I. Consolidation of Cases Pending in this District Would Promote the Efficient
 10 Litigation and Fair Resolution of Plaintiffs' Claims.**

11 Under F.R.C.P. 42, district courts have broad discretion to consolidate cases. Fed. R.
 12 Civ. P. 42(a). Consolidation is appropriate where the actions involve common questions of law
 13 or fact and consolidation will increase the likelihood of efficient and consistent proceedings.
 14 See, e.g., *Investors Research Co. v. U. S. Dist. Court*, 877 F.2d 777 (9th Cir. 1989); *Kemper*
 15 *Sports Mgmt., Inc. v. Westport Investment, LLC*, No. 07-5468 BHS, 2007 WL 4219355, at *2
 16 (W.D. Wash. Nov. 28, 2007).

17 The claims in *Keithly* and *Bebbington* are very similar as they arise from the same
 18 operative facts, cover the same time period, and involve the same defendants, though the
 19 *Bebbington* Complaint contains additional facts that were not known or did not exist at the time
 20 the *Keithly* Complaint was filed, such as Congressional Hearings held in November, 2009. In
 21 addition, the cases are both at the early stages of litigation. Thus, consolidation of the two
 22 actions is appropriate under Fed. R.Civ. P. 42(a). Consolidation will also not prejudice
 23

25 ^{1/}See *Keithly* Dkt. No. 13 (Notice of Filing of Motion to Transfer and Coordinate or Consolidate Actions for Pretrial
 26 Proceedings Under 28 U.S.C. § 1407).

^{2/}*Id.* at Ex. 2, ¶ 3 (Motion of Intelius Inc. for Transfer of Actions to the Western District of Washington Pursuant to
 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings).

Defendant. Rather, consolidation will allow Intelius to defend a single suit involving the same facts and witnesses instead of two separate suits before the same Court. Accordingly, consolidation is in the interests of judicial economy and will promote the efficient resolution of these matters. Plaintiffs respectfully suggest, moreover, that merging these cases into a single action will achieve the greatest judicial economy without changing or compromising any of the parties' rights and thus is appropriate here. *See Kemper*, 2007 WL 4219355, at *2; *Travelers Indemnity Co. v. Longview Fibre Paper & Packaging, Inc.*, No. 07-1009 BHS, 2007 WL 2916541, at *3 (W.D. Wash. Oct. 5, 2007).

II. Appointment of Plaintiffs' Counsel as Interim Class Counsel Will Serve the Best Interests of the Proposed Classes.

Rule 23(g)(3) of the Federal Rules of Civil Procedure enables courts to “designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.” To protect the class interests and advance the litigation efficiently and expeditiously, courts routinely appoint interim lead counsel at early stages in the litigation. *See, e.g., Pfaff v. Washington*, No. 07-5280 RJB, 2007 WL 4225059, at *5 (W.D. Wash. Nov. 27, 2007); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07-5944 SC, 2008 WL 2024957, at *1 (N.D. Cal. May 9, 2008). Plaintiffs, on behalf of themselves and the class they seek to represent therefore respectfully ask the Court to appoint Plaintiffs as Interim Lead Plaintiffs, and to appoint their counsel to act as Interim Class Co-Counsel (until an order on Plaintiffs’ motion for class certification is entered) for the following purposes:

- (1) To coordinate all proceedings, including preparing, structuring, and presenting pretrial and other management-related orders to the Court;
 - (2) To act as spokesperson at all Court hearings and conferences;

- 1 (3) To determine the position of Plaintiffs on all matters arising during these
2 pretrial proceedings (after such consultation with other Plaintiffs' counsel
3 as they deem appropriate) and present such position orally and/or in
writing to the Court and all opposing parties;
- 4 (4) To coordinate, and conduct discovery on behalf of Plaintiffs;
- 5 (5) To consult with and employ experts, as necessary;
- 6 (6) To delegate work responsibilities and monitor the activities of all
7 Plaintiffs' counsel to assure that schedules are met and unnecessary
expenditures of time and expense are avoided;
- 8 (7) To create any necessary committees and appoint committee chairs and
9 otherwise delegate responsibilities for specific tasks in a manner to assure
10 that the pretrial preparation for the various Plaintiffs is conducted
effectively, efficiently, and economically;
- 11 (8) To encourage full cooperation and efficiency among all Plaintiffs'
12 counsel;
- 13 (9) To coordinate and communicate with defendants' counsel with respect to
14 matters addressed in this paragraph; and
- 15 (10) To evaluate and respond to any settlement proposal from Defendant.

16 Rule 23(g)(4) mandates that the attorneys appointed to serve as class counsel must "fairly
17 and adequately represent the interests of the class." Although Rule 23(g)(3) does not provide a
18 standard for selecting interim class counsel, "a court may consider the factors enumerated in
19 Rule 23(g)(1)." *Levitte v. Google, Inc.*, No. 08-3369 JW, 2009 WL 482252, at *2 (N.D. Cal.,
20 Feb. 25, 2009). Under these factors, courts must consider the following criteria in selecting class
21 counsel:

- 23 • the work counsel has done in identifying or investigating
24 potential claims in the action;
- 25 • counsel's experience in handling class actions, other
26 complex litigation, and claims of the type asserted in the
action;

- 1 • counsel's knowledge of the applicable law; and
 2 • the resources counsel will commit to representing the class.

3 Fed. R. Civ. P. 23(g)(1)(A). In addition to these factors, courts may consider "any other matter
 4 pertinent" to counsel's ability to represent the interest of the proposed class. Fed. R. Civ. P.
 5 23(g)(1)(B).

6 **A. Proposed Interim Class Counsel Have, and Will Continue to Commit
 7 Significant Time and Resources to the Prosecution of this Action.**

8 The work proposed Interim Class Counsel have already undertaken in identifying and
 9 investigating potential claims in this action favors their appointment as Interim Class Counsel
 10 and is an indication of the extensive resources counsel will commit to representing the class.
 11
 12 Cohen Milstein began investigating Plaintiffs' claims and trends in e-commerce in 2008. Both
 13 firms have been monitoring legislative and regulatory activities, as well as public enforcement
 14 actions, related to Internet commerce; Plaintiffs' counsel have obtained and reviewed all of the
 15 hundreds of complaints about Intelius's practices that have been received by the Washington
 16 Attorney General and requested the same from the Better Business Bureau. Counsel have
 17 identified and contacted potential experts.
 18

19 Proposed Interim Class Counsel have already committed the time and efforts of
 20 numerous attorneys to the legal research, factual investigation, and prosecution of these cases,
 21 and will continue to do so, keeping in mind appropriate staffing levels for each project.
 22 Moreover, Counsel have the resources needed to litigate this case vigorously for as long as is necessary.
 23
 24
 25
 26

1 **B. Proposed Interim Class Counsel Have Significant Relevant Experience and**
 2 **Knowledge of the Applicable Law.**

3 The qualifications and experience of proposed Interim Class Counsel in federal and state
 4 courts and, specifically, in complex consumer cases involving alleged deceptive representations
 5 and practices, as well as defective products, are set forth in their firm resumes, attached as
 6 exhibits to the Mark Griffin and Andrew N. Friedman Declarations filed herewith.

7 Cohen Milstein has been recognized repeatedly as one of the country's premier plaintiff-
 8 side firms. Declaration of Andrew N. Friedman ("Friedman Decl. at ¶¶ 2-4). With more than 60
 9 lawyers, Cohen Milstein litigates plaintiffs' claims through class actions involving securities
 10 fraud, antitrust violations, and employment rights and benefits. The firm has litigated at every
 11 level in state and federal courts across the country. Notably, Cohen Milstein has litigated
 12 numerous consumer class action cases resulting in recoveries worth hundreds of millions of
 13 dollars for the respective classes. These cases include: *In re Vonage Mktg. and Sales Practices*
 14 *Litig.*, (MDL Dkt. No. 07-3906, D.N.J) (co-lead counsel representing telecommunications
 15 subscribers alleging deceptive advertising and account management practices); *In re Lupron*
 16 *Marketing and Sales Practices Litigation* (No. 01-10861, D. Mass.) (co-lead counsel in action
 17 challenging pharmaceutical companies on pricing policies and methods, ultimately settled for
 18 \$150 million); *In re General Motors Dex-Cool Products Liability Litig.*, (No. 03-208786,
 19 Jackson Cty., Mo.) (executive committee member represented car owners alleging extensive
 20 engine damage caused by defective factory-installed coolant; settlement provided dollar-for-
 21 dollar reimbursement for repair costs); *Kieves v. IDT Corp.* (No. 03-6779, Essex Cty., N.J.) (co-
 22 lead counsel represented subscribers alleging that telecom provider was deceptively representing
 23 nature and size surcharges associated with Universal Service Fund); *Thomson Consumer*
 24
 25
 26

1 *Electronics* (No. 00-000761, Madison Cty., Ill.) (co-lead counsel represented class of television
 2 purchasers; settled when defendant agreed to pay up to \$100 million to reimburse customers for
 3 repairs); *Howard v. Ford Motor Co.* (No. 763785-2, Alameda Cty., Ca.) (trial counsel
 4 represented car owners alleging TFI defect; settled immediately before scheduled second jury
 5 trial); *Fischl v. Direct Merchants Credit Card Bank, N.A.* (No. 00-007129, Hennepin Cty.,
 6 Minn.) (co-lead represented credit cardholders alleging improper charges and payment
 7 processes; settlement included credits for overpayments and changes in business practices);
 8 *Snyder v. Nationwide Mutual Insurance Company* (No. 97-0633, Onondaga Cty, N.Y.) (lead
 9 counsel represented policyholders alleging vanishing premiums; settlement valued at between
 10 \$85 million and \$103 million for policyholders). Friedman Decl. at ¶ 5. In addition to these
 11 cases, Cohen Milstein has held or is holding leadership roles in scores of class actions. Friedman
 12 Decl. at ¶¶ 1, 6.

15 Similarly, Keller Rohrback attorneys have extensive experience handling class actions on
 16 behalf of consumers. *See* Decl. of Mark A. Griffin (“Griffin Decl.”). Keller Rohrback has
 17 litigated hundreds of class action cases during the past 20 years, and has successfully recovered
 18 over \$4 billion for the benefit of victims of price fixing conspiracies, securities fraud, breaches of
 19 fiduciary duties, and deceptive practices. *Id.* at ¶ 2. Moreover, Keller Rohrback attorneys have
 20 litigated dozens of class action cases involving violations of the Washington Consumer
 21 Protection Act (“WCPA”) in state and federal courts. *Id.* at ¶ 3-21.

23 In a recent class action case handled by Keller Rohrback involving violations of the
 24 WCPA, Chief Judge Robert S. Lasnik approved the plaintiffs’ settlement award and stated:
 25 “[T]his is an example of how [a] class action works, and I was very pleased to see it come to this
 26 conclusion.” *Kavu, Inc. v. Omnipak Corp.*, No. 06-109RSL (W.D. Wash. Jan. 24, 2008); Griffin

1 Decl. ¶ 5. On July 29, 2009, the Honorable Richard A. Jones appointed Keller Rohrback L.L.P.
 2 as interim class counsel in a contest over leadership of *In Re Classmates.com Consolidated*
 3 *Litigation*, Master Case No. C09-0045RAJ. *Id.* at ¶ 4. Judge Jones also appointed Keller
 4 Rohrback L.L.P. as class counsel in another consumer case when granting class certification.
 5 *Brotherson v. The Professional Basketball Club, L.L.C.*, 262 F.R.D. 564, 574 (W.D. Wash.
 6 2009). *Id.* at ¶ 4. Judge John C. Coughenour found that Keller Rohrback has “substantial
 7 experience in consumer class action litigation.” *Id.* at ¶ 4; see also *Hansen v. Ticket Track, Inc.*,
 8 213 F.R.D. 412, 416 (W.D. Wash. 2003) (J. Pechman) (the “firm is experienced in class action
 9 litigation and management”); *Mortimore v. FDIC*, 197 F.R.D. 432, 437 (W.D. Wash. 2000) (J.
 10 Coughenour) (the firm is “well qualified to represent the class in this case.”); *Getty v. Harmon*,
 11 No. 98-0178, Sept. 20, 1999, (J. Dwyer) (“Despite substantial obstacles to recovery, Keller
 12 Rohrback was willing to undertake the significant risks presented by this case. After a year and
 13 half of intensive litigation, including extensive discovery, motion practice and mediation, Class
 14 Counsel achieved real and substantial benefits for members of the Class.”). *Id.* at ¶¶ 6-8.

17 Keller Rohrback has obtained substantial injunctive and monetary relief on behalf of
 18 class plaintiffs in consumer protection cases. *See* Griffin Decl., ¶¶ 12 –21. The firm has
 19 represented plaintiffs in a variety of consumer protection cases, including cases in which
 20 consumers were injured by: products containing E.coli, salmonella and lead-based paint;
 21 defective products; improper fees collections; illegal advertising, false and deceptive credit card
 22 practices; and other violations under the WCPA.

24 Moreover, Keller Rohrback has an excellent national reputation in litigating complex
 25 matters. It has the resources to commit to class action litigation, which often involves extensive
 26

1 discovery and motions practice. Keller Rohrback's complex litigation group includes 25
2 attorneys and additional paralegal and administrative support staff.

3 In sum, proposed Interim Class Counsel bring a wealth of litigation and settlement
4 experience with respect to class actions in general, and consumer product and services in
5 particular. Moreover, through their collective experience, proposed Interim Class Counsel
6 possess a strong command of the applicable law, the Federal Rules of Civil Procedure and the
7 Local Rules of this District.

8

9 **CONCLUSION**

10 For the foregoing reasons, Plaintiffs respectfully ask the Court to enter the proposed order
11 submitted herewith that: (a) consolidates the above-captioned actions, (b) appoints Plaintiffs
12 Matthew Bebbington, Bruce Keithly, Donovan Lee and Edith Anna Cramer as Interim Lead
13 Plaintiffs; and (c) appoints Cohen Milstein and Keller Rohrback as Interim Class Co-Counsel.
14

1 DATED this 1st day of April, 2010.

2 KELLER ROHRBACK L.L.P.

3

4 By s/ Mark A. Griffin

5 Mark A. Griffin, WSBA #16296

6 Karin B. Swope, WSBA #24015

7 1201 Third Avenue, Suite 3200

8 *Seattle, WA 98101*

9 Tel: (206) 623-1900

10 Fax: (206) 623-3384

11 Andrew N. Friedman

12 Victoria S. Nugent

13 Whitney R. Case

14 COHEN MILSTEIN SELLERS & TOLL

15 P.L.L.C.

16 1100 New York Avenue, N.W., Suite 500 West
Washington, DC 20005-3964

17 Tel: (202) 408-4600

18 Fax: (202) 408-4699

19 Counsel for Plaintiffs Bruce Keithly, Donovan
20 Lee and Edith Anna Cramer and Matthew
21 Bebbington

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on April 1, 2010, I caused to be served a true and correct copy of the
3 MOTION TO CONSOLIDATE CASES AND APPOINT INTERIM CLASS COUNSEL on the
4 following recipients via the method indicated:

5 Arthur W. Harrigan, Jr., WSBA #1751
6 Tyler Farmer, WSBA #39912
7 DANIELSON HARRIGAN LEYH &
TOLLEFSON, LLP
8 999 Third Avenue, Suite 4400
Seattle, Washington 98104
9 Telephone: (206) 623-1700

- 10 Via ECF
 Via Hand Delivery
 Via U.S. First Class Mail
 Via facsimile to (206) 623-8717
 Via email to:
arthurw@dhlt.com; and
tylerf@dhlt.com

11 *Attorneys for Intelius, Inc and
12 Intelius Sales, LLC*

13 DATED this 1st day of April, 2010.

14 s/Karin B. Swope
15 Karin B. Swope